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(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Criminal Appeal No. 2521 Of 1997

(Memorandum of appeal under Section 374 (2) Cr.P.C.)

APPELLANT : Mannu @ Mahendra Soni, S/o Komal Prasad Soni, aged about 22 years, resident of Rajgamar, thana Balco Nagar, Tahsil Korba district Bilaspur.

Versus

RESPONDENT : The State of Madhya Pradesh, through the District Magistrate, Korba District Bilaspur (MP).

16915

Filed on 2-12-97

by Sh. A. Tripathi Advocate

MEMORANDUM OF APPEAL U/SECTION 374 (2) OF Cr.P.C.

Conviction	Sentence
M.A.R. U/section 363	R.I. for 7 years

29 A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

(DIVISION BENCH)

Criminal Appeal No.2521 of 1997

Mannu @ Mahendra Soni

- Versus -

The State of Madhya Pradesh (Now Chhattisgarh)

And

Criminal Appeal No.584 of 1998

The State of Madhya Pradesh (Now Chhattisgarh)

-Versus-

Mannu @ Mahendra Soni

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge
09-2-2006

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
DHIRENDRA MISHRA
Judge
10-2-2006

POST FOR JUDGMENT ON 10th FEBRUARY, 2006

Sd/-
L.C.BHADOO
Judge
10th-2-2006

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

DIVISION BENCH*: -

HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI DHIRENDRA MISHRA, JJ.

Criminal Appeal No.2521 of 1997

Mannu @ Mahendra Soni

- Versus -

The State of Madhya Pradesh (Now Chhattisgarh)

And

Criminal Appeal No.584 of 1998

The State of Madhya Pradesh (Now Chhattisgarh)

-Versus-

Mannu @ Mahendra Soni

Present: -

Shri Awadh Tripathi, Advocate:	For the appellant in Cr. A. No.2521/97.
Shri U.N.S. Deo, Addl. Public Prosecutor with Shri Akhil Mishra, Panel Lawyer:	For the State/respondent.
Shri U.N.S. Deo, Addl. Public Prosecutor with Shri Akhil Mishra, Panel Lawyer:	For the State/appellant in Cr. A. No.584/98.
Shri Awadh Tripathi, Advocate:	For the respondent.

JUDGMENT

(Delivered on 10th February, 2006)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J.*** -

1. By Criminal Appeal No.2521 of 1997 the accused/appellant has questioned the legality and correctness of the judgment of conviction and order of sentence dated 17-9-97 passed by learned Additional Sessions Judge, Korba in S.T. No. 171/96 whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Sections 363, 366-A, 376, 302 and 201 of the I.P.C., sentenced him to undergo R.I. for 7 years & pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 6 months under Section 363 of the I.P.C., to undergo R.I. for 7 years & pay a fine of Rs.500/-, in default of payment

of fine to further undergo R.I. for 6 months under Section 366-A of the I.P.C., to undergo R.I. for 10 years & pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 6 months under Section 376 of the I.P.C., to undergo R.I. for life under Section 302 of the I.P.C. and to undergo R.I. for 3 years & pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 6 months under Section 201 of the I.P.C.. The State Government has also preferred Criminal Appeal No.584/98 under Section 377 of the Cr.P.C. on the ground of inadequacy of the sentence imposed upon the accused and looking to the facts and circumstances death sentence be imposed upon the accused. Both these appeals are relating to the same crime and arising out of same judgment, therefore, they are being disposed of by this common judgment.

2. The case of the prosecution, in brief, is that in the evening of 26th January 1996 minor girl Uttra Kumari aged about 8 years was playing with the children near the house. However, when she did not return to her house at the time of dinner i.e. 7 p.m., father of Uttra Kumari started searching Uttra Kumari. When her whereabouts could not be known, Nanki father of girl Uttra Kumari made a missing report on 27-1-96 at 7.45 a.m. at the outpost of police chowky Rajgamar to the effect that on 26th January 1996 his daughter Uttra Kumari aged about 8 years was playing along with Atish Kumar Chouhan, aged about 8 years and Sampa Bai Patel, aged about 7 years near the house. After some time, children left for their residence and Uttra Kumari was standing all alone near the Mahua bush. After watching the picture on television, he returned to his house at about 7 p.m., and Uttra Kumari was not at the residence to take dinner. The search was made in the vicinity but her whereabouts could not be known. On receiving this report, missing report No.1/96 was entered in the Rojnamcha Sana. Again missing report Ex.-P/3 was given by Nanki, father of Uttra Kumari, on 27-1-96 in the police outpost Rajgamar. The villagers and police started searching Uttra Kumari.

3. Accused Mannu @ Mahendra Soni, was in police custody in connection with Crime No.0/96 under Sections 457 and 380 of the I.P.C. and was brought in police outpost in the intervening night of 29th/30th January 1996. On enquiry, he made a memorandum Ex.-P/15 on 30-1-96 at 9 a.m. to the effect that in the evening of 26-1-96 he took Uttra Kumari on a shop where he purchased biscuits and after giving those biscuits to Uttra Kumari, took her towards "Pareba Darha" rivulet. After committing rape on her, fearing that she would disclose this incident, he murdered her by pressing her

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neck and threw the body of Uttra Kumari in the "Pareba Darha" rivulet. He also threw one green colour shawl of Uttra Kumari in the rivulet. I can get the body and shawl recovered. Based on this memorandum a search was made and shawl was recovered at about 11 a.m. from the rivulet under Ex.-P/16 in the presence of Dilip Kumar Patel and Radhe Shyam. The body of Uttra Kumari was also located and Panchanamas Ex.-P/12 at 9.45 a.m. & Ex.-P/14 at 10.45 a.m. of the body of deceased Uttra Kumari were prepared after giving notice Ex.-P/13 to the Panchas.

4. While in the police custody the accused gave a memorandum Ex.-P/17 on 30th January 1996 at about 14.30 hours regarding his white pant and printed shirt which he was wearing at the time of commission of offence. The accused disclosed that he can get the same recovered. Based on this memorandum pant and shirt were recovered from the residence of the accused under Ex.-P/18. As some button of the shirt was found missing, therefore, one red colour button along with thread was recovered at the instance of accused from the bank of rivulet under Ex.-P/19. The nail of the accused was taken into possession under Ex.-P/20. One slide from the vaginal part of the deceased and clothes of the deceased which were found on the body were taken into possession under Ex.-P/21. The site plan Ex.-P/22 of the place of occurrence was prepared. The dead body was photographed and sent for postmortem examination to the Government 100 Bedded Hospital, Korba where Dr. R.K. Divya conducted the postmortem on the body of Uttra Kumari and prepared the postmortem report Ex.-P/43 in which he opined that the cause of death is asphyxia secondary to smothering, fracture of nasal bone, laceration of lower lip right side present, ante-mortem and the death was homicidal in nature. The site plan Ex.-P/11 of the place of occurrence was also got prepared from Patwari Shri Babulal Maitri.

5. The merg intimation Ex.-P/32 was given to the P.S. Balco and based on that merg intimation F.I.R. Ex.-P/31 was registered on 30-1-96. Based on another merg intimation Ex.-P/10, F.I.R. Ex.-P/9 was registered without number. The recovered articles were sent for chemical examination to the Forensic Science Laboratory, Sagar from where reports Ex.-P/38, Ex.-P/39 and Ex.-P/40 were received. The injuries on the body of the accused were examined by Dr. R.K. Divya on 31-1-96 and injury report Ex.-P/44 was prepared. After completion of investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate Korba, who in turn

committed the case to the Sessions Judge, Bilaspur from where learned Additional Sessions Judge received the case on transfer.

6. Learned Additional Sessions Judge after hearing counsel for the parties and perusal of the record was of the opinion that *prima facie* offences under Sections 363, 366-A, 376, 302 and 201 of the I.P.C. were made out against the accused, therefore, charges were framed, read over and explained to the accused but he abjured the charges.

7. The prosecution in order to establish the charges against the accused examined 15 witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the evidence of prosecution and circumstances appearing against him and pleaded innocence. He also produced two witnesses in defence namely, DW-1 Kalyan Singh Thakur and DW-2 Kamal Prasad Banjare. Learned Additional Sessions Judge after hearing arguments of Additional Public Prosecutor and counsel for the accused, convicted and sentenced the accused as mentioned in para-1 of this judgment.

8. We have heard learned counsel for the parties.

9. The homicidal death of Uttra Kumari is not in dispute.

10. As far as involvement of the accused/appellant in crime in question is concerned, there is no direct evidence in this matter and the prosecution case rests on the circumstantial evidence. It is settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. The circumstances established means legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof. Since the trial Court has convicted the accused under Sections 363, 366-A, 376, 302 and 201 of the I.P.C. based on the circumstantial evidence and sentenced him to various sentences as mentioned in para-1 of this judgment and the State Government has also filed criminal appeal under Section 377 of the

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Cr.P.C. for enhancement of the sentence to capital punishment on the ground of inadequacy of the sentence imposed by the trial Court, we have to consider the circumstances carefully bearing the principles noticed above in mind.

11. In order to connect the accused with the crime in question the prosecution has tried to establish following circumstances against the accused:-

(i) The accused was seen in the company of Uttra Kumari when she was last seen alive,

(ii) The dead body and shawl of Uttra Kumari were recovered at the instance of the accused as per the information given by him under Section 27 of the Evidence Act,

(iii) The pant, shirt and missing button of shirt of the accused were recovered at the instance of accused, and

(iv) Blood was found on the nail of the accused and human semen was found on the slide which was taken from the vagina of the deceased.

12. Now, we shall proceed to scrutinize and examine the evidence of the prosecution whether the prosecution has been able to establish the crime against the accused based on the circumstances mentioned above bearing in mind the principles mentioned above for recording conviction based on the circumstantial evidence.

(i) **Last seen alive**:- In order to prove this circumstance the prosecution has examined two witnesses namely PW-7 Atish Kumar, aged about 7 years and PW-8 Ram Gopal. In order to convict the accused based on the last seen, the Hon'ble Apex Court in the matter of **BODHRAJ ALIAS BODHA AND OTHERS V. STATE OF JAMMU AND KASHMIR** reported in **(2002) 8 SCC 45**, held that:

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible." The Court further held that "It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

Again, in the matter of **Subhash Chand v. State of Rajasthan** reported in **(2002) 1 Supreme Court Cases 702** the Hon'ble Apex Court held that:

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> ".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime....."

In the matter of **State of Karnataka Vs. M.V. Mahesh** reported in **(2003) 3 Supreme Court Cases 353** the Hon'ble Apex Court held that:

> ".....Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together....."

In view of the above law laid down by the Hon'ble Apex Court, before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is no possibility of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further, it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime.

13. Based on the above settled law laid down by the Hon'ble Apex Court in the above judgments, if we examine the evidence of PW-7 Atish Kumar and PW-8 Ram Gopal, PW-8 Ram Gopal is the person to whose shop, on the fateful day, the accused is said to have taken deceased Uttra Kumari and Atish Kumar for giving them biscuits after purchasing the same from Ram Gopal's shop. He has stated that on 26th January 1996 at about 7 p.m. accused Mannu @ Mahendra came to his shop and purchased biscuits. There were 2-3 boys with him, out of which one was Atish Kumar to whom I know. Whether any girl was with the accused or not he does not know as he was not able to see due to the darkness. As the boy came in front of him that is why he was able to identify him. The accused purchased one packet of biscuit costing Rs. 2.50/- and thereafter he left. On 27th January 1996 he came to know about the death of daughter of

Nanki. From the above evidence, it cannot be inferred that when the accused went to purchase biscuits from the shop of Ram Gopal, deceased Uttra Kumari was with him, as such the evidence of PW-8 Ram Gopal is of no assistance and help to the prosecution for proving the circumstance that Uttra Kumari was seen last with the accused when she was alive.

14. PW-1 Nanki, father of the deceased, in para-11 of his evidence has stated that on 26th January 1996 one shop keeper of the shop which is existing in their vicinity had told him that your child and 3-4 more children were playing. Accused Mannu was distributing biscuits to them in front of his shop after purchasing from him. Where Mannu had gone, he does not know. The police people also enquired from the Shopwala. Why this fact was not mentioned in the report Ex.-P/2 by Nanki which was lodged in the morning of 27th January 1996 itself creates doubt about the last seen theory of the deceased with the accused when she was alive.

15. Now, coming to the evidence of PW-7 Atish Kumar who was aged about 7 years at the time of giving his evidence, he has stated in his evidence that last year he was studying in class-1. In the month of January he was playing with Dharmeen @ Uttra Kumari at his residence. He and she were playing and no other person was there, at that time, accused Mannu came and took him and Dharmeen @ Uttra Kumari to a shop where he purchased biscuits, out of which he gave 5 biscuits to him and 6 biscuits to Dharmeen @ Uttra Kumari, and thereafter he went to his residence. He had not met with Dharmeen @ Uttra Kumari. Where Dharmeen @ Uttra Kumari went he does not know. He also does not know where accused Mannu went. In the cross-examination, this witness has stated that in the night when the incident happened, Nanki had not come to his house to enquire about the whereabouts of Uttra Kumari. However, next day morning Dilip and 3-4 persons along with Nanki also came. On enquiry by them, he informed them that when he went to the house Dharmeen @ Uttra Kumari was standing under the Mahua bush and same fact he disclosed to the police. It is correct to say that Dilip asked him to tell biscuit story. It is also true that on being told by him he gave a statement to the police. It is correct that his father and Dilip are friends. In this regard it is relevant to look at the law laid down by Apex Court regarding placing reliance on the evidence of a child witness. The Hon'ble Apex Court in the matter of **ARBIND SINGH V. STATE OF BIHAR** reported in **1995 Supp (4) Supreme Court Cases 416** held that:

> "Child witness is prone to tutoring and hence court should look for corroboration particularly when the evidence betrays traces of tutoring."

In that case PW-2 Poonam Kumari, who was the daughter of the deceased and appellant, was the child witness and the Court after scrutinizing the evidence reached to the conclusion that there were improvements in the statement of the child witness, as in her first statement she did not say that her mother was hanged. Subsequently, she said that her mother was hanged by electric wire, she later said that she was hanged with the help of a jute string and in her statement recorded under Section 164 of Cr.P.C. she stated that her father had thrown a jute string around the neck of her mother and killed her. Therefore, the Court reached to the conclusion that the child witness was not consistent in her version and there was tutoring on certain aspects. Therefore, the Court held that implicit faith and reliance cannot be placed on her testimony since it was not corroborated by any independent and reliable evidence. Child witness is prone to tutoring and hence the Court should look for corroboration particularly when the evidence portrays traces of tutoring. In another decision, in the matter of **PANCHHI AND OTHERS V. STATE OF U.P.** reported in **AIR 1998 Supreme Court 2726** the Hon'ble Apex Court held that:

> "It cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring."

The Hon'ble Apex Court, in another decision, in the matter of **SURYANARAYANA VS. STATE OF KARNATAKA** reported in **2001 (1) Crimes 99 (SC)** held that:

> "Evidence of a child cannot be rejected per se, but the court as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of child cannot be discarded only on the ground of her/his being Teen age. The evidence of a child witness would require the court to scrutinize the evidence with care and

> caution. When the witness is shown to have stood the test of cross-examination and there is no infirmity in the evidence, the prosecution can rightly claim a conviction based upon the said testimony alone. Corroboration of testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony."

Therefore, before placing reliance on the evidence of a child witness the Court has to scrutinize the evidence of a child very carefully and with circumspection as the children are prone to tutoring. Based on the above principle, if we look into the evidence of PW-7 Atish Kumar, in the first instance, this witness has not stated that the accused took Dharmeen @ Uttra Kumari along with him after providing the biscuits. On the contrary, this witness has stated that he returned to his house and Dharmeen @ Uttra Kumari was standing under the Mahua bush. He has not stated that the accused was also standing there. Moreover, in para-6 of his evidence, he has stated that whatever Dilip asked him he informed the police. Nanki, father of the deceased, in the morning of 27th January 1996 made a missing report Ex.-P/2 at the police outpost Rajgamar and in that report Nanki very clearly mentioned that on 26-1-96 Uttra Kumari along with this witness namely Atish Kumar and one Sampa Bai Patel aged about 7 years were playing near the residence. After some time children left for their residence and Uttra Kumari was standing all alone near the bush. When Nanki mentioned this fact in the report Ex.-P/2 that on the fateful day Uttra Kumari was playing with Atish Kumar PW-7, they left to their residence, thereafter she was seen standing all alone under the bush and enquires were made from PW-7 Atish Kumar then why this fact of purchasing of biscuits by the accused from the shop of PW-8 Ram Gopal and providing the same to Uttra Kumari and PW-7 Atish Kumar was not mentioned in this report. This fact creates a doubt about the reliability of evidence of PW-7 Atish Kumar specially with reference to paras-6 and 7 of the evidence in which he has stated that he disclosed biscuits thing to Dilip. Whatever statement he made to the police was made as told by Dilip. In para-5 of his evidence, he has also stated that Dilip, Nanki and 3-4 persons came to his house next morning. Had this witness saw the accused providing biscuits and Nanki met this witness, then why this fact was found missing from the report Ex.-P/2, creates a reasonable suspicion about the veracity of the evidence of PW-7 Atish Kumar. In this report, it has been mentioned that Uttra Kumari was standing under the bush and

there is no mention that the accused was also standing nearby or anybody saw him taking Uttra Kumari with him. Therefore, based on the above judgments of the Apex Court, if we scrutinize the evidence of PW-7 Atish Kumar, being a child witness, same does not inspire confidence of the Court. In view of the foregoing discussion, the prosecution has failed to establish this circumstance in order to connect the accused with the crime in question.

16. As far as 2nd circumstance is concerned, in F.I.R. Ex.-P/31 which was registered by PW-14 R. N. Pandey, I.O., it has been mentioned that intimation was given on 30th January 1996 at 0.30 hours i.e. in the intervening night of 29th and 30th January 1996. In this report it has been mentioned that "on interrogation from suspect Mannu, the dead body of missing Uttra Kumari is recovered," whereas, if we look into memorandum Ex.-P/15 in which time of taking the accused in custody is mentioned as on 29-1-96 at 23.10 hours in the night, but there is overwriting in the date and time, and it has been written that the information was given on 30th January 1996 at 9 a.m.. As per this memorandum when the information Ex.-P/15 was given by the accused at 9 a.m. on 30th January 1996, then how in F.I.R. Ex.-P/31 which was entered at 0.30 hours in the intervening night of 29th and 30th January 1996 the fact of recovery of the body at the instance of the accused was mentioned. This creates doubt and shows manipulation by the investigating officer. Similarly, even though PW-14 R.N. Pandey has explained that last line of Ex.-P/15 was written in different ink because ink of the pen was dried up and the last line is that "I can get recovered body and shawl". These words were *prima facie* inserted between 'E' to 'E' of Ex.-P/15 later on. If we look into the memorandum Ex.-P/15, this is a Ball Pen writing, therefore, there was no occasion to dry up the ink and this is false explanation given by the I.O.. As has been mentioned above, there is overwriting between 'F' to 'F' about the date. Earlier some other date was written and thereafter, by overwriting the date was written as 29th January 1996 whereas perusal of the arrest memo Ex.-D/3 shows that arrest was made in the night of 30th January 1996 at 21.00 hours whereas in the memorandum Ex.-P/15 custody has been shown to be taken in the night of 29-1-96 at 23.10 hours. In the light of above discrepancy, if we look into the evidence of PW-6 Dilip Kumar Patel in whose presence body and other articles are said to have been recovered and memorandum Ex.-P/15 was alleged to have been given by accused, in para-6 of his evidence, he has

categorically stated that they caught the accused at about 1 a.m. in the night of the incident, after enticing him they took him to the police outpost and in the police custody I asked him you tell the correct thing and I will save you, on which the accused disclosed that from the shop he took biscuits, provided the same to Uttra Kumari, took her to Shanti Nagar from where he took her to the place of occurrence i.e. Mahuagaon and after committing rape on her, murdered her by pressing her neck and threw her in the rivulet (Nala). The accused also disclosed that since last 3 days he was searching the body. Since the body was not seen, therefore, he was not able to flee and memorandum Ex.-P/15 was given by the accused. He has further stated that 15-20 persons were searching the body and shawl of the deceased. In the light of the above evidence of this witness, if we look into the whole facts of the case, a reasonable inference can be drawn that the accused was taken into custody on the date of the incident by the police. They were searching for body since last 2-3 days and when body was traced out all these papers were prepared. PW-6 Dilip has not been declared hostile and on many places he took somersault. Again in para-22 of his evidence, he has stated that it is incorrect to say that the accused was caught in the night of the incident at 1 a.m. Whatever he stated in para-6 of his evidence is incorrect. In para-13 of his evidence he has stated that on the same night Nanki father of Uttra Kumari disclosed him that Uttra Kumari was playing with one boy namely Atish Kumar and one or two girls. Same fact was disclosed to the police. When Nanki was knowing about this fact, then why he has not disclosed to the accused that why he provided biscuits to Atish Kumar and others, creates doubt about reliability of the evidence of Nanki and this witness. Therefore, the evidence of PW-6 Dilip does not inspire confidence of the Court regarding the memorandum given by the accused Ex.-P/15 and in pursuance of that body and shawl were recovered. Similarly, in view of the discrepancy pointed out earlier regarding timing of preparation of documents Ex.-P/31, FIR, Ex.-P/15 memorandum and Ex.-P/12 Panchanama of the body, no reliance can be placed on the evidence of PW-11 Radhe Shyam and Investigating Officer PW-14 Ramesh Pandey regarding these documents. PW-11 Radhe Shyam has even stated that he signed the papers in police station on 26-1-96.

17. As far as recovery of the pant and shirt at the instance of the accused is concerned, PW-6 Dilip Kumar Patel in para-30 of his evidence has stated that at the time of recovery of pant and shirt of the accused from his

house, the accused had not accompanied the police, only one head constable and father of the accused went to the house from where father of the accused brought the clothes and they were taken into possession, therefore, recovery of the pant and shirt at the instance of the accused stands falsifies. As far as recovery of button from the place of occurrence is concerned, PW-11 Radhe Shyam, in para-8, has stated that button was searched by Ramcharan from the place of occurrence from the sand of the river. But Ramcharan has not been examined. Moreover, merely on the basis of recovery of button, based only on this solitary circumstance, it is difficult to connect the accused with the crime in question. In the first instance, in view of the earlier discussion about the time of memorandum and arrest viz. a viz. F.I.R. Ex.-P/31, memorandums which were prepared at the one time have not been considered worth reliance as same do not inspire confidence of the Court on account of discrepancies pointed out earlier. Therefore, for the above reasons, recovery of button from the sand near the rivulet on 30-1-96 is also doubtful. The suspicious circumstances in which memorandums and recovery of Shirt and Pant have been shown, the recovery of button from the place of occurrence is also doubtful. Even assuming that button of the shirt was recovered from the place of occurrence, on this solitary circumstance, looking to the totality of the circumstances, it is difficult to connect the accused with the crime in question.

18. As far as 4th circumstance that blood was found on the nail of the accused is concerned, as per the report Ex.-P/38 no blood grouping or serologist's report is there to show that the blood which was found on the nail was of the blood group of the deceased, therefore, only on the basis of this circumstance the accused cannot be connected with the crime in question. As far as human semen was found on the slide which was taken from the vagina of the deceased is concerned, there is no serologist's report to indicate that semen was of the accused. Even there is no report of the doctor who conducted postmortem on the dead body of the deceased that there were any sign of committing rape on the deceased. Based on this circumstance the accused cannot be connected with the crime in question.

19. For the foregoing discussion, the prosecution has utterly failed to connect the accused with the crime in question based on the settled principles mentioned above and prove that the accused was the only person responsible for commission of crime in question. Therefore, finding of the trial Court convicting the accused for commission of the offence under

Sections 363, 366-A, 376, 302 and 201 of the I.P.C. cannot be sustained as the same is not based on legally established circumstantial evidence.

20. It is very unfortunate to note that such a ghastly crime of first committing rape upon a teenager and thereafter brutally murdering her is going unpunished because of latches on the part of the Investigating Officer in conducting the proper and full proof investigation. We have no option but to painfully convert conviction of the appellant into acquittal.

21. In the result, Cr. A. No.2521 of 1997 filed by the accused/appellant succeeds and same is allowed. The conviction and sentences imposed on the accused/appellant are set aside. The accused/appellant be set at liberty forthwith unless required to be detained in any other case. Consequently, criminal appeal No.584 of 1998 filed by the State Government fails and same is dismissed.

Sd/-
L.C.BHADOO
Judge

10th-2-2006

Sd/-
DHIRENDRA MISHRA
Judge

10-2-2006

Barve